No. 23-21

IN THE

# Supreme Court of the United States

STUART R. HARROW, *Petitioner*,

v.

DEPARTMENT OF DEFENSE, *Respondent*.

**On Writ of Certiorari**
**to the United States Court of Appeals**
**for the Federal Circuit**

**BRIEF OF *AMICI CURIAE* LAW PROFESSORS IN SUPPORT OF PETITIONER**

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## INTEREST OF AMICI CURIAE[1]

*Amici curiae* are law professors and legal scholars from across the country with expertise in civil procedure, federal jurisdiction, and related subjects. *Amici* have an interest in assuring that federal courts distinguish properly between jurisdictional requirements and nonjurisdictional claim-processing rules. *Amici* believe that the Federal Circuit has fundamentally misapplied this Court's recent case law in this area, undermining the fairness and efficiency of the judicial system. A complete list of *amici* is set forth in the appendix hereto.

## SUMMARY OF ARGUMENT

In recent years, this Court has frequently addressed whether to treat certain litigation requirements as jurisdictional conditions or as nonjurisdictional claim-processing rules. It has laudably strived "to bring some discipline" to the over-classification of litigation requirements as jurisdictional. *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 435 (2011). It has justifiably criticized "drive-by jurisdictional rulings," *e.g.*, *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 511 (2006) (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 91 (1998)), that have "mischaracterized claim-processing rules or elements of a cause of action

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[1] Under Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

as jurisdictional limitations." *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 161 (2010).

Disregarding the letter and spirit of this Court's precedent, the Federal Circuit mistakenly treats as jurisdictional the 60-day deadline for filing a petition for review of decisions by the Merit Systems Protection Board (MSPB). *See* 5 U.S.C. § 7703(b)(1)(A). This result is irreconcilable with this Court's recent guidance on "the 'critical difference[s]' between true jurisdictional conditions and nonjurisdictional limitations on causes of action." *Reed Elsevier*, 559 U.S. at 161 (brackets in original) (quoting *Kontrick v. Ryan*, 540 U.S. 443, 456 (2004)).

**1.** As this Court has recognized, giving a litigation requirement jurisdictional status has significant practical consequences. *See Henderson*, 562 U.S. at 434 ("This question is not merely semantic but one of considerable practical importance for judges and litigants."). It changes the "normal operation of our adversarial system," *id.*, because courts must enforce a jurisdictional prerequisite on their own initiative—even if the parties have waived or forfeited any objection based on that requirement, *see, e.g.*, *Sebelius v. Auburn Regional Medical Center*, 568 U.S. 145, 153 (2013) ("Objections to a tribunal's jurisdiction can be raised at any time, even by a party that once conceded the tribunal's subject-matter jurisdiction over the controversy."). For this reason, treating a requirement as jurisdictional can severely undermine the fairness and efficiency of the judicial system. It can cause "a waste of adjudicatory resources and can disturbingly disarm litigants," *id.*, because dismissal might be required even after the court and the parties have devoted significant

resources to the litigation, *see Henderson*, 562 U.S. at 435 (noting that "many months of work on the part of the attorneys and the court may be wasted").

**2.** This Court's recent decisions provide important guidance on how to distinguish jurisdictional conditions from nonjurisdictional claim-processing rules. Crucially, it has dispensed with earlier statements indicating that "the taking of an appeal within the prescribed time is 'mandatory and jurisdictional.' " *See Bowles v. Russell,* 551 U.S. 205, 209 (2007) (quoting *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 61 (1982)). This Court has made clear that such language was "left over from days when we were 'less than meticulous' in our use of the term 'jurisdictional.' " *Hamer v. Neighborhood Hous. Servs. of Chi.*, 583 U.S. 17, 26-27 (2017) (quoting *Kontrick*, 540 U.S. at 454).

In clarifying its older case law, this Court has provided a straightforward rule: if a requirement does "not involv[e] the timebound transfer of adjudicatory authority from one Article III court to another," then it must be treated as a nonjurisdictional claim-processing rule unless Congress "clearly states" that it "shall count as jurisdictional." *Id.* at 25 & n.9 (citation omitted). Section 7703(b)(1)'s 60-day deadline does not govern the transfer of adjudicatory authority between Article III courts; it governs a direct petition to review a decision by an agency (the MSPB) in an Article III court (the U.S. Court of Appeals for the Federal Circuit). Therefore, this deadline can be treated as jurisdictional only if there is a clear statement from Congress to that effect.

Congress has made no such clear statement regarding § 7703(b)(1). Although Congress need not

"incant magic words in order to speak clearly," *Hamer*, 583 U.S. at 25 n.9 (citation omitted), there is no textual, contextual, or historical basis for finding a "clear indication that Congress wanted that provision to be treated as having jurisdictional attributes," *Henderson*, 562 U.S. at 439. The operative text contains no jurisdictional language whatsoever: "Notwithstanding any other provision of law, any petition for review shall be filed within 60 days after the Board issues notice of the final order or decision of the Board." 5 U.S.C. § 7703(b)(1)(A). The text does not refer to the *authority* of the court in which such a petition is filed. Nor is there a "long line of earlier cases," *cf. John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 137 (2008), supporting the view that the 60-day deadline for seeking review of MSPB decisions is jurisdictional in nature.

Despite this lack of support, the Federal Circuit concluded that the 60-day deadline is jurisdictional because of 28 U.S.C. § 1295(a)(9), which provides that the Federal Circuit "shall have exclusive jurisdiction . . . of an appeal from a final order or final decision of the Merit Systems Protection Board, pursuant to sections 7703(b)(1) and 7703(d) of title 5." This language, however, makes no reference to the time deadline itself—it simply refers to the *type* of "final order or final decision" of the MSPB that the Federal Circuit may review. It is not remotely the sort of "clear indication" that is required under this Court's case law.

The lack of a clear statement by Congress means that § 7703(b)(1)'s 60-day filing deadline cannot be treated as jurisdictional—"even when the time limit is important (most are) and even when it is framed in

mandatory terms (again, most are).” *United States v. Wong*, 575 U.S. 402, 410 (2015). A deadline does not qualify as jurisdictional where, as here, the statutory “text speaks only to a claim’s timeliness” and “not to a court’s power.” *Id.* To make a time requirement jurisdictional, “Congress must do something special, beyond setting an exception-free deadline.” *Id.* Congress has not done so here.

**3.** The argument for a jurisdictional reading of § 7703(b)(1)(A) is not bolstered by the inclusion of this claim-processing rule in a statutory waiver of federal sovereign immunity. Although the Government’s initial consent to suit must be made in unequivocal statutory text, a strict jurisdictional reading is reserved to the core questions whether federal sovereign immunity has been expressly waived and the basic scope of that statutory waiver. *Gomez-Perez v. Potter*, 553 U.S. 474, 491 (2008); *see generally* Gregory C. Sisk, *Litigation With the Federal Government* 94 (3d ed. 2023).

This Court has regularly turned aside the Government’s insistence that time bars should be treated as jurisdictional conditions on the waiver of sovereign immunity. *Wong,* 575 U.S. at 417-20; *Scarborough v. Principi*, 541 U.S. 401, 421 (2004). This Court’s adoption of “a less jaundiced approach toward statutory waivers of sovereign immunity is especially well marked in cases involving procedural regulation of the mode of litigation as contrasted with the substantive scope of waiver legislation.” Gregory C. Sisk, *The Continuing Drift of Federal Sovereign Immunity Jurisprudence*, 50 Wm. & Mary L. Rev. 517, 580 (2008).

## ARGUMENT

### I. Treating a Requirement As Jurisdictional Has Important Practical Consequences and Should Not Be Done Lightly.

The term "jurisdiction" refers to " 'a court's adjudicatory authority.' " *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 160 (2010) (quoting *Kontrick v. Ryan*, 540 U.S. 443, 455 (2004)). Properly understood, therefore, the term "applies only to 'prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction)' implicating that authority." *Id.* (quoting *Kontrick*, 540 U.S. at 455)). And "not all procedural requirements fit that bill." *Boechler, P.C. v. Commissioner of Internal Revenue*, 596 U.S. 199, 203 (2022).

During the last decade or so, this Court has frequently addressed whether particular requirements, including time limits like the one at issue in this case, are jurisdictional. *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 434 (2011) ("In this case, as in others that have come before us in recent years, we must decide whether a procedural rule is 'jurisdictional.' " (citing cases)); *see also, e.g.*, *Wilkins v. United States*, 598 U.S. 152, 155 (2023) (holding that the Quiet Title Act's 12-year deadline is not jurisdictional); *Boechler*, 596 U.S. at 211 (holding that 26 U.S.C. § 6330(d)(1)'s 30-day deadline to file a petition for review in Tax Court is not jurisdictional); *Hamer v. Neighborhood Hous. Servs. of Chi.*, 583 U.S. 17, 28 (2017) (holding that Fed. R. App. P. 4(a)(5)(C)'s limits on the extensions of time a court may grant for filing a notice of appeal are not jurisdictional); *United States v. Wong*, 575 U.S. 402, 405 (2015) (holding that

the time limits imposed on claims brought under the Federal Tort Claims Act are not jurisdictional); *Sebelius v. Auburn Regional Medical Center*, 568 U.S. 145, 149 (2013) (holding that the statutory 180-day deadline for filing appeals to the Provider Reimbursement Review Board is not jurisdictional). This attention is well-deserved: "This question is not merely semantic but one of considerable practical importance for judges and litigants." *Henderson*, 562 U.S. at 434.

Treating a particular requirement as jurisdictional is especially significant because doing so "alters the normal operation of our adversarial system." *Id.*

> Under that system, courts are generally limited to addressing the claims and arguments advanced by the parties. . . . But federal courts have an independent obligation to ensure that they do not exceed the scope of their jurisdiction, and therefore they must raise and decide jurisdictional questions that the parties either overlook or elect not to press.

*Id.*; *accord Hamer*, 583 U.S. at 20 ("In contrast to the ordinary operation of our adversarial system, courts are obliged to notice jurisdictional issues and raise them on their own initiative."); Fed. R. Civ. P. 12(h)(3) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action."). When a defect is jurisdictional, it is "not subject to waiver or forfeiture and may be raised at any time in the court of first instance and on direct appeal." *Hamer*, 583 U.S. at 20 (footnote omitted); *accord Boechler*, 596 U.S. at 203 ("Jurisdictional

requirements cannot be waived or forfeited, must be raised by courts *sua sponte*, and . . . do not allow for equitable exceptions."); *Auburn*, 568 U.S. at 153 ("Objections to a tribunal's jurisdiction can be raised at any time, even by a party that once conceded the tribunal's subject-matter jurisdiction over the controversy.").

This feature can adversely affect the fairness and efficiency of the judicial system. Because a lack of subject-matter jurisdiction can be raised at any time, dismissal might be required even after the court and the parties have committed considerable time and expense to the litigation. *Wilkins*, 598 U.S. at 157-58 ("When such eleventh-hour jurisdictional objections prevail post-trial or on appeal, 'many months of work on the part of the attorneys and the court may be wasted.' " (quoting *Henderson*, 562 U.S. at 435)). Such dismissals can cause "a waste of adjudicatory resources and can disturbingly disarm litigants." *Auburn*, 568 U.S. at 153. A party might even wait until it loses on the merits and then opportunistically seek dismissal based on a lack of jurisdiction. *See, e.g.*, *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 508 (2006) (noting that the defendant lost a $40,000 verdict and "[t]wo weeks later, . . . filed a motion under Federal Rule 12(h)(3) to dismiss [the] complaint for lack of subject-matter jurisdiction"); *Henderson*, 562 U.S. at 434-35 ("[A] party, after losing at trial, may move to dismiss the case because the trial court lacked subject-matter jurisdiction.").

Put simply, "[h]arsh consequences attend the jurisdictional brand." *Santos-Zacaria v. Garland*, 598 U.S. 411, 416 (2023) (quoting *Fort Bend County v. Davis*, 139 S. Ct. 1843, 1849 (2019)). Recognizing

these consequences, this Court has "tried in recent cases to bring some discipline to the use of this term." *Henderson*, 562 U.S. at 435; *accord MOAC Mall Holdings LLC v. Transform Holdco LLC*, 598 U.S. 288, 298 (2023); *Boechler*, 596 U.S. at 203. It has revisited earlier decisions that had "mischaracterized claim-processing rules or elements of a cause of action as jurisdictional limitations," *Reed Elsevier*, 559 U.S. at 161, calling them "drive-by jurisdictional rulings," *e.g.*, *Arbaugh*, 546 U.S. at 511 ("We have described such unrefined dispositions as 'drive-by jurisdictional rulings' that should be accorded 'no precedential effect' on the question whether the federal court had authority to adjudicate the claim in suit." (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 91 (1998))); *see also id.* at 510 ("This Court, no less than other courts, has sometimes been profligate in its use of the term.").

Accordingly, this Court's recent decisions have been especially cognizant of "the 'critical difference[s]' between true jurisdictional conditions and nonjurisdictional limitations on causes of action." *Reed Elsevier*, 559 U.S. at 161 (brackets in original) (quoting *Kontrick*, 540 U.S. at 456). As the next Part shows, the broader principles this Court has developed confirm that the Federal Circuit is wrong to treat § 7703(b)(1)'s 60-day deadline as jurisdictional.

## II. Under this Court's Principles for Determining Which Litigation Requirements Are Jurisdictional, the Federal Circuit Must Be Reversed.

This Court's recent decisions have provided important clarification on which litigation requirements must be treated as jurisdictional. Among other things, this Court has drawn a distinction between statutory deadlines "governing the transfer of adjudicatory authority from one Article III court to another," and other kinds of requirements. *Hamer*, 583 U.S. at 25. For requirements that do *not* govern the transfer of adjudicatory authority between Article III courts—like § 7703(b)(1)'s 60-day deadline for seeking Federal Circuit review of MSPB decisions—a clear statement rule applies: the requirement is not jurisdictional unless Congress "clearly states that [it] shall count as jurisdictional." *Hamer*, 583 U.S. at 25 & n.9 (quoting *Gonzalez v. Thaler*, 565 U.S. 134, 141 (2012)). This rule compels reversal of the Federal Circuit in this case.

### A. A Rule that Does Not Govern the Transfer of Adjudicatory Authority Between Article III Courts Is Jurisdictional Only if Congress Clearly States That It Is Jurisdictional.

Although this Court's earlier decisions had stated that "the taking of an appeal within the prescribed time is 'mandatory and jurisdictional,' " *Bowles v. Russell,* 551 U.S. 205, 209 (2007) (quoting *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 61 (1982)), this Court has since clarified that this notion does not apply to the kind of deadline at issue here. In *Hamer*, this Court explained that this

"formulation" from *Bowles* and earlier decisions—that appeal deadlines were "mandatory and jurisdictional"—was "a characterization left over from days when we were 'less than meticulous' in our use of the term 'jurisdictional.' " *Hamer*, 583 U.S. at 26-27 (quoting *Kontrick*, 540 U.S. at 454); *see also id.* (noting that several Courts of Appeals had "tripped over" this statement and incorrectly treated time limitations as jurisdictional).[2]

To address this Court's prior lack of "meticulous[ness]," *id.* at 27, *Hamer* drew an important distinction between (a) "a time prescription governing the transfer of adjudicatory authority from one Article III court to another," and (b) "cases not involving the timebound transfer of adjudicatory authority from one Article III court to another," *id.* at 25 & n.9. Time-specifications of the second kind are non-jurisdictional claim-processing rules unless "the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional." *Id.* (quoting *Gonzalez*, 565 U.S. at 141); *see also Fort Bend County*, 139 S. Ct. at 1850 n.6 (2019) ("If a time prescription governing the transfer of adjudicatory

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[2] This Court has similarly rebuffed its statement in *Stone v. INS*, 514 U.S. 386 (1995), regarding the jurisdictional nature of provisions governing judicial review of agency decisions in the immigration context, *id.* at 399, 405. Just last Term, it explained that *Stone* predates the recent line of cases "starting principally with *Arbaugh* in 2006, that 'bring some discipline to the use of the term' 'jurisdictional.' " *Santos-Zacaria*, 598 U.S. at 421 (internal brackets omitted) (quoting *Henderson*, 562 U.S. at 435). And in *Stone*—as in other instances of "drive-by jurisdictional rulings," *Steel Co.*, 523 U.S. at 91—"whether the provisions were jurisdictional 'was not central to the case.' " *Santos-Zacaria*, 598 U.S. at 421 (quoting *Reed Elsevier*, 559 U.S. at 161)).

authority from one Article III court to another appears in a statute, the limitation will rank as jurisdictional; otherwise, the time specification fits within the claim-processing category." (internal quotation marks and brackets omitted) (quoting *Hamer*)).[3]

Section 7703(b)(1)'s 60-day deadline does *not* "involv[e] the timebound transfer of adjudicatory authority from one Article III court to another." *Hamer*, 583 U.S. at 25 n.9. It governs a direct petition to review a decision by an agency (the MSPB) in an Article III court (the U.S. Court of Appeals for the Federal Circuit). Accordingly, it can be treated as jurisdictional only if there is a clear statement from Congress to that effect. For the reasons set forth in the next Section, Congress has made no such clear statement.

### B. Congress Has Not Clearly Stated that § 7703(b)(1)'s 60-day Deadline Is Jurisdictional.

As described above, this Court's recent case law provides that § 7703(b)(1)'s 60-day deadline can be treated as jurisdictional only if Congress has "clearly state[d]" that it "shall count as jurisdictional." *Hamer*, 583 U.S. at 25 n.9 (citation omitted); *see also Stern v. Marshall*, 564 U.S. 462, 479-80 (2011) ("Because 'branding a rule as going to a court's subject-matter

[3] Even for time restrictions that *do* involve transfer of adjudicatory authority from one Article III court to another, time restrictions imposed by federal rules rather than by Congress will not qualify as jurisdictional. *Hamer*, 583 U.S. at 27; 4B C. WRIGHT, A. MILLER & A. STEINMAN, FEDERAL PRACTICE AND PROCEDURE § 1168 (Supp. 2023), at 49 ("In 2017, the Supreme Court emphasized once again the distinction between statutory and rule-based time limitations." (citing *Hamer*)).

jurisdiction alters the normal operation of our adversarial system,' we are not inclined to interpret statutes as creating a jurisdictional bar when they are not framed as such." (quoting *Henderson*, 562 U.S. at 434)).

This clear-statement rule is informed by the problematic practical consequences—described above—that ensue when rules are treated as jurisdictional: "Congress ordinarily enacts preconditions to facilitate the fair and orderly disposition of litigation and would not heedlessly give those same rules an unusual character that threatens to upend that orderly progress." *MOAC Mall Holdings*, 598 U.S. at 298. This interpretive principle "seeks to avoid judicial interpretations that undermine Congress' judgment," because "[l]oosely treating procedural requirements as jurisdictional risks undermining the very reason Congress enacted them." *Wilkins*, 598 U.S. at 157.

This Court has indicated that Congress need not "incant magic words in order to speak clearly," and that courts may consider "'context, including this Court's interpretations of similar provisions in many years past,' as probative of Congress' intent," *Hamer*, 583 U.S. at 25 n.9 (brackets omitted) (quoting *Auburn*, 568 U.S. at 145, 153-54). There must be, however, a "clear indication that Congress wanted that provision to be treated as having jurisdictional attributes." *Henderson*, 562 U.S. at 439; *accord Wong*, 575 U.S. at 410 ("[T]raditional tools of statutory construction must *plainly show* that Congress imbued a procedural bar with jurisdictional consequences." (emphasis added)); *Boechler*, 596 U.S. at 203-04 (quoting *Wong*).

There is no clear indication that Congress wanted § 7703(b)(1)'s 60-day deadline to be treated as jurisdictional. The relevant text has no jurisdictional language whatsoever: "Notwithstanding any other provision of law, any petition for review shall be filed within 60 days after the Board issues notice of the final order or decision of the Board." 5 U.S.C. § 7703(b)(1)(A).[4] There is no "long line of earlier cases" supporting the view that the deadline is jurisdictional in nature, *cf. John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 137 (2008), much less a "definitive" decision by this Court, *Wong*, 575 U.S. at 416 (noting that this Court's holding in *John R. Sand & Gravel* "came down to two words: *stare decisis*" because that time bar "had been the subject of 'a definitive earlier interpretation' " (quoting *John R.*

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[4] This Court's case law makes clear that the word "shall" does not make a time requirement jurisdictional. *See Wong*, 575 U.S. at 411 ("The language is mandatory—'shall' be barred—but . . . that is true of most such statutes, and we have consistently found it of no consequence."); *Henderson*, 562 U.S. at 438 (treating as non-jurisdictional a requirement that "a person adversely affected by [a] decision *shall* file a notice of appeal . . . within 120 days" (emphasis added) (quoting 38 U.S.C. § 7266(a)); *see also Arbaugh*, 546 U.S. at 510 ("[I]n recent decisions, we have clarified that time prescriptions, however emphatic, are not properly typed jurisdictional." (internal quotation marks and citations omitted)). In *Wong*, this Court addressed an especially "emphatic" statute, which provided that "[a] tort claim against the United States *shall be forever barred* unless it is presented [within the designated time]." 575 U.S. at 410-11 (emphasis added) (quoting 28 U.S.C. § 2401(b)). Yet it concluded that the deadline was not jurisdictional: "[T]he language might be viewed as emphatic— 'forever' barred—but (again) we have often held that not to matter. What matters instead is that § 2401(b) does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts." *Id.* at 411 (internal quotation marks and citations omitted).

*Sand & Gravel*, 552 U.S. at 138)). It certainly cannot be said that this Court has "definitively interpreted" § 7703(b)(1) as jurisdictional. *See Wilkins*, 598 U.S. at 165 (concluding that the 12-year deadline in the Quiet Title Act was not jurisdictional because "[t]his Court has never definitively interpreted § 2409a(g) as jurisdictional").

Lacking anything resembling a clear textual, contextual, or historical indicator that § 7703(b)(1)'s 60-day deadline is jurisdictional, the Federal Circuit embraces an odd interpretive theory. It reasons that Congress made the 60-day deadline jurisdictional through the provision in 28 U.S.C. § 1295(a)(9) that the Federal Circuit "shall have exclusive jurisdiction . . . of an appeal from a final order or final decision of the Merit Systems Protection Board, pursuant to sections 7703(b)(1) and 7703(d) of title 5." *See, e.g.*, *Fed. Educ. Ass'n-Stateside Region v. Dep't of Defense*, 898 F.3d 1222, 1225 (Fed. Cir. 2018) (discussing 28 U.S.C. § 1295(a)(9)). This reference, however, does not constitute the sort of "clear indication" that Congress intended the 60-day deadline to be jurisdictional. Rather, this language in § 1295(a) refers to the *type* of order that falls within the exclusive jurisdiction of the Federal Circuit. *See id.* at 1230 (Plager, J., dissenting) ("What is clear is that the purpose of § 1295(a) is to state *which* cases come to the Federal Circuit, not *when* they may come." (emphasis in original)).

It would be quite an interpretive leap to read § 1295(a)(9) as incorporating, as jurisdictional requirements, every procedural element that is referred to in those particular sections of Title 5 of the U.S. Code. *See Fed. Educ. Ass'n-Stateside Region v.*

*Dep't of Defense*, 909 F.3d 1141, 1145 (Fed. Cir. 2018) (en banc) (Wallach, J., dissenting from denial of the petition for rehearing en banc, joined by Newman & O'Malley, JJ.) (noting that "[t]he sixty-day deadline is mentioned in one sentence of the two cross-referenced provisions, i.e., § 7703(b)(1) and § 7703(d), with the cross-referenced provisions containing two subsections each and a total of fourteen sentences"); *see also id.* ("The legislative history of § 1295 confirms that the purpose of this statute is to identify *which* cases, by subject matter, are within our jurisdiction, rather than *which timely-brought* cases are within our jurisdiction." (emphasis in original)).

If taken to its logical extent, the Federal Circuit's reasoning would mean that a slew of other requirements—beyond those relating to MSPB decisions—would also be swept into the "jurisdictional" category. Section 1295(a), after all, refers to *numerous* sections of the U.S. Code in listing the types of orders that may be appealed to the Federal Circuit.[5] Such cross-references are too thin a

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[5] *See, e.g.*, 28 U.S.C. § 1295(a)(4)(B) (giving the Federal Circuit exclusive jurisdiction over "an appeal from a decision of . . . the Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office or the Trademark Trial and Appeal Board with respect to applications for registration of marks and other proceedings as provided in section 21 of the Trademark Act of 1946 [15 U.S.C. § 1071]"); *id.* § 1295(a)(6) (giving the Federal Circuit exclusive jurisdiction "to review the final determinations of the United States International Trade Commission relating to unfair practices in import trade, made under section 337 of the Tariff Act of 1930 [19 U.S.C. § 1337]"); *id.* § 1295(a)(8) (giving the Federal Circuit exclusive jurisdiction over "an appeal under section 71 of the Plant Variety Protection Act [7 U.S.C. § 2461]"); *id.* § 1295(a)(10) (giving the Federal Circuit exclusive

basis for inferring a "clear indication" by Congress to make every requirement imposed by those sections jurisdictional.

At the end of the day, there is no reason to treat § 7703(b)(1)'s 60-day filing deadline any differently from the myriad of deadlines that this Court has "[t]ime and again . . . described . . . as 'quintessential claim-processing rules,' which 'seek to promote the orderly progress of litigation,' but do not deprive a court of authority to hear a case." *Wong*, 575 U.S. at 410 (quoting *Henderson*, 562 U.S. at 435). This logic holds "even when the time limit is important (most are) and even when it is framed in mandatory terms (again, most are)." *Id.* Where, as here, the statutory "text speaks only to a claim's timeliness" and "not to a court's power," *id.*, it does not qualify as jurisdictional. To make a time requirement like this one jurisdictional, "Congress must do something special, beyond setting an exception-free deadline." *Id.*

Accordingly, the Federal Circuit's conclusion that § 7703(b)(1)'s 60-day deadline is jurisdictional cannot stand. This Court should correct that mistake and "bring some discipline" to the distinction between jurisdictional bars and nonjurisdictional claim-processing rules. *Henderson*, 562 U.S. at 435.

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jurisdiction over "an appeal from a final decision of an agency board of contract appeals pursuant to section 7107(a)(1) of title 41"); *id.* § 1295(a)(13) (giving the Federal Circuit exclusive jurisdiction over "an appeal under section 506(c) of the Natural Gas Policy Act of 1978 [15 U.S.C. § 3416]").

### III. Statutory Time Limits in Statutory Waivers of Federal Sovereign Immunity are Presumptively Non-Jurisdictional in Nature and Must be Applied Consistently With Ordinary Expectations in Civil Litigation.

The Government's plea for a rigid jurisdictional cast to the 60-day time limit to seek Federal Circuit review of a final order or decision by the Merit System Protection Board, 5 U.S.C. § 7703(b)(1)(A), is not bolstered by the provision's inclusion in a statutory waiver of federal sovereign immunity.

"Since the dawn of the twenty-first century, the Supreme Court has moved ever more deliberately toward an interpretive approach that reserves jurisdictional analysis, strict construction, and presumptions in favor of the Government to core questions about whether sovereign immunity has been expressly waived and the basic scope of that waiver." Gregory C. Sisk, *Litigation With the Federal Government* 94 (3d ed. 2023).

The Federal Government's consent to suit must be expressed through unequivocal statutory text. *United States v. Nordic Village, Inc.*, 503 U.S. 30, 33-37 (1992). For the United States to be amenable to any judicial action on a particular theory of liability and for a specific type of remedy, an unambiguous waiver by statute must be shown. In short, jurisdiction for the claim itself lies only when there is "a clear statement from the United States waiving sovereign immunity." *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 472 (2003); *see generally* Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 Boston U. L. Rev. 109, 145-50 (2010); John Copeland

Nagle, *Waiving Sovereign Immunity in an Age of Clear Statement Rules*, 1995 Wis. L. Rev. 771, 773-76, 796-98, 806.

But a strict jurisdictional reading is reserved for those core questions whether federal sovereign immunity has been expressly waived in the statute and the basic scope of that statutory waiver.

For other terms, definitions, exceptions, limitations, and procedures appearing in a statutory waiver of federal sovereign immunity, ordinary tools of statutory interpretation and typical expectations for civil litigation govern. *See Gomez-Perez v. Potter*, 553 U.S. 474, 491 (2008) (noting that when a "statutory provision unequivocally provides for a waiver of sovereign immunity to enforce a separate statutory provision," other provisions and terms " 'need not . . . be construed in the manner appropriate to waivers of sovereign immunity' " (citations omitted)); *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 285 (2012) (characterizing the supposed corollary that "limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied" as having "made sense when suits against the government were disfavored, but not in modern times" (citation omitted)).

Indeed, the argument for strict jurisdictional construction fades the further the analysis moves past the threshold questions of the existence and general scope of an immunity waiver. This Court's adoption of "a less jaundiced approach toward statutory waivers of sovereign immunity is especially well marked in cases involving procedural regulation of the mode of

litigation as contrasted with the substantive scope of waiver legislation." Gregory C. Sisk, *The Continuing Drift of Federal Sovereign Immunity Jurisprudence*, 50 Wm. & Mary L. Rev. 517, 580 (2008).

This Court has regularly turned aside the Government's insistence that time bars should be treated as jurisdictional conditions on the waiver of sovereign immunity.[6] In *Scarborough v. Principi*, this Court reiterated that "[o]nce Congress waives sovereign immunity, we observed, judicial application of a time prescription to suits against the Government, in the same way the prescription is applicable to private suits, 'amounts to little, if any, broadening of the congressional waiver.' " 541 U.S. 401, 421 (2004) (quoting *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95 (1990)); *see also Wong,* 575 U.S. at 409-12 (Language in the Federal Tort Claims Act declaring that a claim "shall be forever barred" unless filed within two years, 28 U.S.C. § 2401(b), is "mundane" in nature and imposes "time limits, nothing more. Even though they govern litigation against the Government, a court can toll them on equitable grounds."); *Henderson v. United States*, 517 U.S. 654, 667-68 (1996) (holding that a prior provision

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[6] The narrow exception to this pattern is *John R. Sand & Gravel*, 552 U.S. at 134-39, where the Court invoked *stare decisis* to adhere to nineteenth century cases that had declared the statute of limitations for money claims in the Court of Federal Claims, 28 U.S.C. § 2501, to be jurisdictional. *See* Gregory C. Sisk, *Twilight for the Strict Construction of Waivers of Federal Sovereign Immunity*, 92 N.C. L. Rev. 1245, 1294 (2014) (characterizing *John R. Sand & Gravel* as a "detour" premised on statutory *stare decisis* (citation omitted)). As discussed *supra* Section II.B, there is no *stare decisis* justification for treating § 7703(b)(1)'s 60-day deadline as jurisdictional.

in the Suits in Admiralty Act requiring that service of a suit against the Government be made "forthwith" was not jurisdictional because it fell into the category of statutory provisions that have a " 'procedural' cast" and "deal with case processing, not substantive rights or consent to suit" (citations omitted)). Under American common law, statutes of limitations traditionally have been understood to be "procedural restrictions" rather than "substantive provisions." *Sun Oil Co. v. Wortman*, 486 U.S. 717, 725-26 (1988) (discussing choice of law principles).

In sum, the Government should not be granted two layers of presumptive protection, *both* on whether a waiver of sovereign immunity exists *and* on what terms, limitations, procedures, and processing rules apply to that waiver. When there is a clear and unequivocal statutory waiver of sovereign immunity, the Government has shed the cloak of immunity and should generally be subject to the same procedural and time-processing rules that apply to private civil litigants.

## CONCLUSION

For the foregoing reasons, the judgment of the Federal Circuit should be reversed and the case remanded for further proceedings.

Respectfully submitted,

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# APPENDIX

## TABLE OF APPENDICES

**Page(s)**

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